SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

in the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 50

MORTIMER NORMAN KORAN,

Petitioner

-

v.

STATE OF FLORIDA,

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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STATEMENT OF THE CASE

Respondent will accept the Statement of the Case as set forth Petitioner's brief as being essentially correct.

QUESTIONS PRESENTED

QUESTION ONE

THROUGH THE ELECTRONIC SURVEILANCE OF PETITIONER OCCURRED PRIOR TO THE DECISION IN KATZ V UNITED STATES ON DECEMBER 18, 1967, DID THE INTRODUCTION INTO EVIDENCE OF TAPE RECORDINGS OF ORAL AND TELEPHONE CONVERSATIONS OF PETITIONER, WHEN PETITIONER ELECTED NOT TO TESTIFY AT HIS TRIAL, CONSTITUTE A VIOLATION OF HIS RIGHTS UNDER BOTH THE FOURTH AND FIFTH AMENDMENTS?

ARGUMENT

Petitioner here contends that the precedents established in **Lee v Florida,** 392 US 378 (1968) and **Katz v United States.** 389 US 347 (1967) would require that his conviction be set aside. Petitioner does recognize that the effect of these decisions has been held to be prospective only in **Fuller v Alaska,** 383 US 80 (1969) and **Desist v United States,** 394 US 244 (1969). Respondent contends that these latter cases are controlling on the issue presented herein and that there is no reason to deviate from the holdings in **Fuller** and **Desist,** supra.

Respondent would show however that **Lee v Florida,** supra would not require that this conviction be set aside even if applied retrospectively. The **Lee** case involved an electronic

listening device which was attached to a party line in such a way that all telephone conversations over this particular line were recorded. In the instant case, the only conversations which were recorded were those between two specific individuals, one an under cover agent, and the recording was merely the best evidence of the fact that such conversations took place (R 78-103).

The same factual distinctions demonstrate that Petitioner is in error in contending that **Katz v United States,** supra, would be applicable if applied retrospectively. **Katz** involves an electronic listening device located in such a way that it would record all telephone conversations taking place within a telephone booth. Here, no geographical area, however small, was the subject of blanket recording of all conversations within that area.

Berger v New York, 388 US 41 (1967) cited by Petitioner is likewise factually dissimilar. **Berger** involved the installation of a recording device in an office for a period of 60 days, within which time all conversations within this office were subject to being recorded.

The factual circumstances of this case place it within the rule of **Lopez v United States,** 373 US 427 (1963), wherein this Court held as follows:

> "A wire recording of a conversation of a federal internal revenue agent and a defendant in the latter's office is admissable at defendant's trial on a charge of attempted bribery of the agent, where the recording device was used only to obtain the most reliable evidence possible of the conversation . . . and the

> device was not planted by means of an unlawful invasion of defendant's premises . . . but was carried in and out by agent who was there with defendant's consent."

Florida Courts followed the **Lopez** holding in **Gomian v State,** 172 So.2d 511 (1965) and **Hajdu v State,** 189 So.2d 230 (1966), both of which are similar to the instant case.

Petitioner's argument that the use of this recording of the conversation between himself and an informer indicates an "unfair" trial overlooks the overwhelming evidence of guilt in the record. This recording was merely corroborative of the eye witness testimony of Agent Rivers (R77-103), Sergeant Hardin (R115-141), Agent Chalfont (R141-144), Agent Lindsay (R149-152), and Sergeant Brady (R162-195).

For these reasons, we respectfully submit that Petitioner contentions on this issue are without merit.

QUESTION TWO

DID THE ADMISSION INTO EVIDENCE OF THE FRUITS OF A WARRANTLESS SEARCH, NOT INCIDENTAL TO THE ARREST, BASED ON A CONSENT BY PETITIONER DURING CUSTODIAL INTERROGATION, WHEN PETITIONER WAS NOT ADVISED OF HIS RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO GIVING SUCH CONSENT, VIOLATE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT?

ARGUMENT

This issue raised by Petitioner here is whether the warnings given by law enforcement officials were within constitutionally accepted standards, particularly with reference to his consent to a warrantless search of his place of business.

We do not take issue with the point of law here raised by Petitioner; we simply contend that the factual circumstances clearly show a voluntary, knowing, intelligent waiver by Petitioner.

To begin with, there certainly was ample evidence available at the time of Petitioner's arrest to make the obtaining of a search warrant a mere formality. The facts known to the police authorities has been refered to in the preceding question. No warrant was obtained because Petitioner signed a written waiver of search warrant.

Prior to any search, Petitioner was fully advised of his constitutional rights by Agent Rivers (R95), Sgt. Hardin (R117), Agent Lindsay (R152), and Sgt. Brady (R163, 164).

Sgt. Hardin testified as follows (R127):

> "I advised him again that he didn't have to answer any questions or make any statements, and I strongly suggested he call his attorney; and he made three phone calls, and he told me he was calling a real estate attorney. He told me he was calling an attorney who helped him purchase his house, and in my own mind I thought it would be a real estate attorney. So after he made his phone calls we went

> into the back office, and I asked him if this was the printing press he used to print the driver's licenses on. He said, 'you won't find anything on that. I scrubbed the blanket off with alcohol,' and I didn't know what the blanket was. I asked him what was the blanket, and he pointed to a section of the machine."

The voluntariness of Petitioner's waiver is further shown by this testimony of Sergeant Brady (R164,165):

"A Well, I talked to Mr. Koran, and he didn't have a whole lot to say, and I asked him did he have any objections to a search of his automobile, his home, and his printing shop in Hallandale; and he said, 'No,' and I said, 'Would you sign a waiver of search?' So I read the waiver of search to him, and at this time Sergeant Hardin of the Miami Police Department was standing right there, and he made a point of telling Mr. Koran that he did not have to submit to a search. He agreed to a search and signed the waiver of search—three of them, in fact—one for his home, one for his automobile, and one for his shop. However, we did not execute the one on his home because of his ill mother."

Other pertinent testimony is found in the Record

at page 194,195:

> "Q. Did Sergeant Hardin advise him of his rights back there at the power station?
>
> A. Yes, I advised him of his rights. Keith Hardin was standing right next to me, and after I had advised

him of his rights, Keith made an effort to point out—and he used this manner—he pointed to Mr. Koran. He said, 'Now, Mort, do you really understand that you do not have to submit to a search?' He said, 'Yes, yes, I have been around.' "

We respectfully submit that the record herein reveals that Petitioner had full and complete warnings of his constitutional rights and that he voluntarily, knowingly and intelligently waived a search warrant.

CONCLUSION

Respondent respectfully submits that none of the issues raised by Petitioner justify the issuance of a Writ of Certiorari and that the judgment and sentence of the trial court should not be disturbed.

Respectfully submitted,

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By _____
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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District, has been furnished Honorable H. Robert Koltnow, 1201 Biscayne Building, 19 West Flagler Street, Miami, Florida, this____day of _____, 1970.

_____

JAMES M. ADAMS

of Counsel